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Ex Parte

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Ms. Meredith Jones
Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Implementation of Section 302 of the Telecommunications Act of 1996; CS Dkt. 96-46

Dear Ms. Jones:

The Joint Parties (Bell Atlantic, BellSouth, GTE, Lincoln Telephone, Pacific Bell, and SBC Communications) appreciated the opportunity to meet with you and your staff last Friday. In this letter, we offer further responses to questions raised in that meeting.

You asked what criteria the Commission should use to evaluate the reasonableness of prices for OVS carriage. OVS operators typically will be the third entrant into local markets for multichannel video programming delivery. Therefore, it would be completely inappropriate and anticompetitive for the Commission to inquire into the reasonableness of prices during the certification process or at any other time prior to the filing of a complaint. In a complaint proceeding, the complainant should bear the burden of establishing that the challenged price is unreasonable. There can be, however, no formula for evaluating the reasonableness of prices for OVS carriage. In the existing market for the delivery of multichannel video programming, some video programming providers are paid by system operators, some pay system operators for carriage, and some split revenues with system operators. Such compensation arrangements reflect the value of carriage to the video programming provider as well as the value of the programming to customers. Open video systems will not succeed if operators must force video programming providers to accept unfamiliar or undesired business arrangements. Competitive market conditions will drive operators' pricing decisions and those conditions will vary from place to place and over time as competition for multichannel video programming delivery becomes more intense.

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It may, however, be possible to describe a “safe harbor” that can minimize litigation regarding the reasonableness of prices. Satisfaction of such a test would preclude further inquiry into the reasonableness of prices for OVS carriage. Failure to satisfy the test would not create a presumption of unreasonableness or in any way prejudice the outcome of a further inquiry into the reasonableness of the challenged price. Moreover, the burden would continue to rest on the complainant to prove that the prices are unreasonable. We propose the following:

Prices for carriage on an OVS shall be conclusively presumed reasonable under the following circumstance: (1) at least one programmer unaffiliated with the OVS operator, other than the complaining party, has contracted for carriage by the OVS operator at a price equivalent to or greater than the challenged price; and (2) the OVS operator charges unaffiliated video programming providers prices that are equivalent to those it charges affiliated video programming providers for carriage of similar programming under similar circumstances. Nothing in this paragraph shall preclude an OVS operator from adducing additional evidence in support of its claim that its prices are reasonable.

For this safe harbor to provide OVS operators the flexibility needed to develop marketing arrangements with unaffiliated programming providers, a video programming provider should be considered to be “unaffiliated” for the purpose of this test unless the video programming provider “owns or controls, is owned or controlled by, or is under common ownership or control with” the OVS operator. See Section 3(33), Telecommunications Act of 1934, as amended by the Telecommunications Act of 1996.

You also asked whether the Commission should require OVS operators to set forth prices for carriage on a “rate card.” As we have previously stated, any requirement that contracts for carriage be made public would produce anticompetitive results and should not be imposed. Moreover, a mandated rate card could unnecessarily preclude alternate approaches that individual OVS operators might develop to address the same issues. Accordingly, the Commission should not require publication of a rate card.

The Commission should, however, give OVS operators the option to use rate cards to establish a more comprehensive safe harbor than that described above. The following provisions will provide incentives for the use of rate cards and will ensure that rate cards serve to discourage, rather than encourage, litigation:

1. Rate cards will be available only upon bona fide request by potential video programming providers, but will not otherwise be published.
2. The reasonableness of prices on rate cards can be challenged only in complaint proceedings.

3. If affiliated video programming providers pay prices set forth on the rate card and at least one nonaffiliated video programming provider has contracted for carriage at such prices, prices on the rate card will conclusively be presumed to be reasonable.
4. If carriage at the prices on the rate card is available to similarly situated video programming providers, the OVS operator's prices will conclusively be presumed to be not unreasonably or unjustly discriminatory.
5. Contracts negotiated for prices different from those on rate cards will be presumed to be not unjustly or unreasonably discriminatory. Such contracts will not be subject to disclosure except in complaint proceedings. In those proceedings, such contracts will be treated as proprietary in accordance with the rules proposed at pages 12-14 of the Appendix to the Comments of the Joint Parties.

You also inquired how the Commission should define the role of state and local governments in the permitting process related to OVS operators' use of public rights-of-way. At page 2 of the Open Video System Rules proposed in the Appendix to the Joint Parties' Comments, we offered the following language, which makes clear that state and local governments shall not impose additional burdens on OVS operators beyond those imposed in connection with normal permitting processes for the use of public rights-of-way for interstate communications facilities:

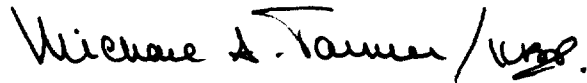
(d) Effect of Commission approval. Commission approval of a certificate of compliance shall preclude any state or local authority from taking the following actions: (i) requiring an open video system operator that has existing authority to place any kind of communications facilities on public rights-of-way to obtain additional authorization for the use of such rights-of-way for the construction of an open video system; and (ii) imposing on an open video system operator any requirement or condition with respect to construction or operation of the open video system over public rights-of-way that is any more burdensome than requirements or conditions imposed on other entities using such public rights-of-way for interstate communications facilities.

Attached is a comparison of the rules proposed by the Joint Parties and those proposed by the National League of Cities. By subjecting open video systems to virtually the same regulation as cable system overbuilders and to rigid OVS regulation, the League's proposal would effectively reinstate local franchise regulation and would eliminate any incentive to deploy open video systems. The League's proposal would thereby deprive video programming providers of any opportunity to deliver programming over open systems.

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We will be happy to provide any additional input that you may find helpful.

Sincerely,

A handwritten signature in black ink that reads "Michael A. Tanner" followed by a stylized flourish or set of initials.

Michael A. Tanner

On behalf of the Joint Parties (Bell Atlantic, BellSouth,
GTE, Lincoln Telephone, Pacific Bell, and SBC
Communications)

Attachment

cc: John Logan
Gary Laden
Rick Chesson

COMPARISON OF PROPOSED OVS RULES JOINT PARTIES VS. NLC

ISSUE	JOINT PARTIES	NLC
Need for state/local authority involvement in OVS process	<ul style="list-style-type: none"> -Act shows Congress' intent that there be no state/local involvement beyond normal ROW permit -Commission approval of a certificate of compliance precludes any state or local authority from taking following actions: <ul style="list-style-type: none"> requiring an OVS operator with existing ROW authority to obtain additional authorization for OVS & imposing on OVS operator any stricter condition than required by other entities using such public rights-of-way for interstate communications facilities 	<ul style="list-style-type: none"> -FCC should codify state/local authority involvement -FCC rules shall be applied in a manner than reflects federal partnering w/ state & local govt in authorization & regulation of OVS
Cable Operators as OVS operators	<ul style="list-style-type: none"> -Should be allowed 	<ul style="list-style-type: none"> -Should not be allowed in their franchised area
Streamlined certification process	<ul style="list-style-type: none"> -10-day review process specified by Congress; certificate of compliance not front-loaded 	<ul style="list-style-type: none"> -Suggest front-loaded process: prove ROW authorization, certification by LFA that OVS operator will fulfill obligations, contains complete carriage agreements, require annual report filings including financial information for affiliate sufficient for FCC to determine cash flow
Open Access Issues	<ul style="list-style-type: none"> -Joint Parties defines unaffiliated programmer such that it does not limit the relationship to a carrier-user one 	<ul style="list-style-type: none"> -No entity shall be considered an independent video programmer if it has any financial or business relationship with the OVS operator other than carrier-user relationship;
Channel Counting	<ul style="list-style-type: none"> - Channels reserved for PEG & must-carry & shared channels are included in "total activated" channels for purpose of calculating 1/3 capacity 	<ul style="list-style-type: none"> -PEG & must-carry channels shall not count as part of the total channel capacity nor as part of the channel capacity for which the operator selects video programming services for carriage; shared channels shall count as part of 1/3 capacity
Channel Capacity	<ul style="list-style-type: none"> -Operators should be given broad flexibility to respond to the market needs 	<ul style="list-style-type: none"> -Minimum req't for independent programmer is not less than 1/2 hour

Contract Period	<p>-OVS operator may limit capacity made available to any single unaffiliated programmer to an amount no greater than the amount of channel capacity allocable to the operator & its affiliate</p> <p>-When demand exceeds capacity it will not be considered discriminatory for the operator to refuse to reduce its capacity to accommodate requests until the end of the current contract period</p> <p>-In any case, the operator /affiliate will not be reqd to reduce its capacity to less than 1/3 of total activated channels</p> <p>-If operator has selected programming for no more than 1/3 capacity it is not considered discrimination to refuse requests for carriage</p> <p>-OVS operators are permitted to require video programmers to agree to minimum contract periods for carriage; marketplace should dictate</p>	<p>-If OVS operator has more than 1/3 capacity it has 30 days to meet request for carriage if capacity is not available</p> <p>-OVS may not limit amount of channel capacity to independent that is less than 1/3 of activated channels</p> <p>-Minimum contracts of not more than 1 month and maximum contract of not less than 1 year</p>
Nondiscriminatory Carriage	<p>-OVS operator may offer or market directly to subscribers all programming selected by it or its affiliate as well as programming selected by unaffiliated programmers</p> <p>-channel sharing is at discretion of OVS operator</p> <p>-OVS operators are permitted to create class of service in pricing based on credit worthiness or financial stability; OVS operators are permitted to require security deposits. Operators are not permitted to manifest factors such as creditworthiness in price differentials if such factors are already taken into account through different terms or conditions.</p>	<p>-OVS operator may not offer to its subs programming carried by independent programming if OVS operator may offer same channel through shared channel (mandates channel sharing)</p> <p>-Financial reqts may amount to only 2 months' carriage</p> <p>-OVS operator may not discriminate among independent video providers based on financial qualifications</p>

Analog/Digital	-OVS operator/affiliate may use all analog as its 1/3 capacity if necessary to create a viable system	-Channel allocation/ capacity limits apply independently to analog & digital
Rate Issues	-Rates are just & reasonable absent a complaint	-Rate differences must be justified based on actual costs of providing carriage & reasonable discounts offered to nonprofit independent programmers -MFN clause should be in each independent programmers contract so they get benefit offered to similarly situated rogrammers
Public Rates	-Rates & contracts should not be made public	-OVS operators must make all agreements & rates publicly available at all times; must be filed with FCC within 15 days after execution
Safe Harbor	** (1) Carriage at the challenged price is available to other video programmers and at least one unaffiliated programmer has contracted with OVS operator at a price greater than or equivalent to the challenged price and (2) an OVS operator charges unaffiliated programmers prices that are equivalent to prices it charges itself or affiliated programmers for carriage of similar programming under similar circumstances	-Four independent programmers provide service on system & independent programming providers occupy at least 1/3 of activated channels
Fees in Lieu of Franchise Fees	-Gross revenues shall include revenues of the operator only for the provision of cable service and shall exclude any federal, state, city or other tax, fee or surcharge imposed upon subscribers, subscriber deposits on equipment owned by OVS operator, charges billed to subs but not collected, refunds to subs, revenues collected from video programmers for carriage and for any services provided by the operator in connection with such carriage and any fees paid in lieu of franchise fees	-Revenue base may include, without limitation, billings to subs, late & administrative fees, payments from video programmers

PEG requirements	<ul style="list-style-type: none"> -OVS operator shall make capacity available equivalent to that generally in use in OVS service area [Joint parties do not believe PEG requirements include equipment and facilities] -OVS operator not required to dedicate entire channels to any particular PEG entity -OVS operator shall make PEG access available to qualified users on first-come, first-served basis, by lottery or by any other reasonable mechanism 	<ul style="list-style-type: none"> -Includes services, facilities & equipment -OVS operator must make PEG channels available to all persons served whether or not they receive other services -Franchising authority has authority to require interconnection of cable & OVS
Enforcement	<ul style="list-style-type: none"> -FCC will resolve any dispute by aggrieved party within 180 days after filing of complaint 	<ul style="list-style-type: none"> -FCC may investigate any potential violation upon a complaint or at any time on its own motion -FCC will investigate under following conditions: (a) one or both conditions of safe harbor are not met (b) if OVS operator or affiliate has suffered a loss for 2 years (c) a contract for carriage lacks MFN clause (d) contracts for carriage contain inconsistent rates, terms or conditions without adequate explanation from OVS operator (e) FCC is aware of any potential violation
Dispute resolution	<ul style="list-style-type: none"> -Burden of proof in discrimination disputes rests with the complainant 	<ul style="list-style-type: none"> -OVS operator shall have burden of showing that its treatment of programmer is nondiscriminatory -FCC cannot resolve issues relating to ownership control or management of, compensation for public ROW

**See Joint Parties' May 1 letter to Cable Bureau